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Supreme Court of the United States

October Term, 1978.

No. 78-148

KAISER ALUMINUM & CHEMICAL CORP. and
KAISER ALUMINUM & CHEMICAL SALES, INC.,
Petitioners,

v.

COLUMBIA METAL CULVERT CO., INC.

BRIEF IN OPPOSITION TO

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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COUNTER STATEMENT OF THE QUESTIONS PRESENTED

1. Should this Court grant Certiorari where the Judgment below is not final, because the Circuit Court of Appeals reversed and remanded this Antitrust Case for a New Trial, and the record at the Second Trial will be Different?

2. Is the decision of the Third Circuit in this case, that plaintiff's evidence was sufficient to enable a jury to find that Petitioners, parent and subsidiary, are jointly liable under Sections 1 and 2 of the Sherman Act where they acted jointly to eliminate plaintiff as a competitor, in conflict with decisions of this Court or other Circuits?

3. Should this Court grant Certiorari to review the Third Circuit's discussion of the sufficiency of the plaintiff's evidence to allow a jury to find under Sections 1 and 2 of the Sherman Act, a price squeeze as part of the joint actions in restraint of trade, and that the relevant product market is aluminum culvert pipe?

COUNTER STATEMENT OF THE CASE

Respondent-Plaintiff, Columbia Metal Culvert Company, Inc. ("Columbia"), is a fabricator of aluminum culvert and drainage pipe located in Vineland, New Jersey. However, Columbia's business activities are now dormant due to the actions of Petitioners-Defendants, Kaiser Aluminum and Chemical Corporation ("KACC") and its subsidiary, Kaiser Aluminum and Chemical Sales, Inc. ("KACSI"), (sometimes collectively referred to as "Kaiser").

Columbia's antitrust trial was terminated at the close of its evidence by a directed verdict against Columbia. Columbia appealed to the Third Circuit which held the district court erred as to KACC and KACSI, and granted a new trial.[1]

At the outset, we must point out that KACC-KACSI's Petition for Writ of Certiorari makes a serious misrepresentation of the record in describing KACC and KACSI. Page 8 of the Petition states that KACSI "is engaged in the sale of the aluminum products manufactured by its parent, KACC." Page 17 states KACSI only has a sales function. These statements contradict Answers to Interrogatories by KACC and KACSI which were read into the record at N.T. 2399-2402. The Highway Products Division of *KACSI* was the *only* unit within Kaiser which *manufactured* and then sold aluminum culvert pipe. It is very misleading to state that KACSI was only a sales unit. The Sheet and Plate Division of KACC manufactures aluminum sheet and aluminum coil, sells coil to independents and also "transfers" coil to KACSI. KACC does not manufacture aluminum culvert, the product in this case. The fact that KACC and KACSI had distinct functions but acted jointly to eliminate Columbia as a competitor, is extremely important on the major issue raised by KACC and KACSI in their Petition, i.e., the legal capacity of parent and subsidiary to conspire with each other under Section 1 of the Sherman Act.

The Product involved in this case is aluminum culvert pipe, which is used for drainage in road building and home construction. Aluminum culvert pipe is fabricated from aluminum sheet and coil, from a specific and unique aluminum alloy alclad (H-3004—H-34). In the 1960's, Kaiser relied on Columbia to build a market for aluminum culvert pipe in Southern New Jersey and adjacent areas. South Jersey was a particularly suitable area for the growth of aluminum culvert pipe because aluminum had great advantages over other types of culvert in a salt water environment. Columbia purchased almost 100% of its aluminum raw material from KACSI, and worked closely with KACSI in the promotion of aluminum as a culvert.

Although Kaiser nurtured and assisted Columbia in Columbia's early years, later, when Columbia had become a potent competitor and sought to be an independent force in the marketplace, Kaiser took actions which caused Columbia's demise and put Columbia out of business. The evidence showed KACC-KACSI started their hostile actions in early 1971, after Columbia refused to purchase 100% of its raw material from KACSI. The Kaiser defendants omit any mention of these facts in their Petition but do not dispute the sufficiency of the evidence which the Court of Appeals held was proof of predatory intent to eliminate Columbia as a competitor, and that Columbia's evidence proved it was injured in fact by the KACC-KACSI actions.

In 1971, Columbia began to assert its independence and sought out another supplier of aluminum coil (it was at that time purchasing 100% from Kaiser). The retaliation by Kaiser took several forms:

> (a) Kaiser refused to sell aluminum coil and sheet (and other specialty items which only KACSI manufactured) to Columbia because Columbia had started purchasing from Reynolds. (N.T. 2023, 2057-9)
>
> (b) Holmes Collins, KACSI's manager, told a Reynolds official that he was upset that Reynolds was shipping metal into Columbia, and because of this, Kaiser would establish a plant "across the street" from Columbia, to be in direct competition with Columbia,[2] and KACC-KACSI did exactly as they threatened. (N.T. 858)

[1] Two other defendants in the district court, as to whom the Court of Appeals affirmed the directed verdict, are no longer in the case, Columbia having decided to accept the Circuit Court's Judgment.

[2] This Court has held that relocation of plant facilities for the purpose of eliminating a competitor can be an action in restraint of trade. See *Schine Chain Theatres v. U.S.*, 334 U.S. 110, 119 (1948).

(c) Established Columbia's top salesman Robert A. Kennedy as a Kaiser distributor, against the recommendation of Kaiser's credit manager, and gave Kennedy a $2000 "finder's fee" to switch a large job for aluminum culvert pipe to Kaiser, while Kennedy was still employed at Columbia. (N.T. 989-1019)

(d) Told Alcoa's marketing manager Tom Melrose that Alcoa "had another thing coming" if Alcoa intended to enter the aluminum culvert market by sales to independent fabricators, such as Columbia (N.T. 1940-1).

(e) Imposed a price "squeeze" on Columbia, when KACC, which dominated the U.S. market for aluminum sheet and coil (market share over 75%, see Ex. P. 839 to 842) sold coil and sheet to independent fabricators at a price equal to KACSI's price for fully fabricated aluminum culvert pipe. KACSI had over 80% of the market for aluminum culvert pipe in both the stipulated geographic market, as well as the entire United States (N.T. 338 and Ex. P. 201). The KACC-KACSI pricing strategy did not leave any margin for an independent fabricator such as Columbia to incur the cost of fabrication and make a reasonable return on investment, and effectively eliminated competition from independents. (see below).

At page 15-16 of the Petition, the Kaiser defendants assert that "Columbia abandoned its theory that defendants have monopolized, conspired to monopolize, attempted to monopolize and conspired to restrain trade and commerce through predatory pricing of finished aluminum culvert pipe in the relevant geographic area . . ." Columbia absolutely denies that any such concession was made at oral argument. Certainly the Court of Appeals did not notice such a concession, and its holding is inconsistent with the alleged concession.

Although KACC and KACSI quote extensively from the District Court's opinion, we submit that this opinion ignored much of Columbia's evidence. This was clear error by the district court, because, to sustain a directed verdict against

plaintiff, *all* of Columbia's evidence must be reviewed in the light most favorable to Columbia. Specifically, the District Court:

(1) on the issue of the relevant product market, did not even cite the decision by this Court closest to the facts of this case, *U.S. v. Aluminum Co. of America*, 377 U.S. 271 (1964); and ignored all of Columbia's evidence that aluminum culvert was a specialty product and *not* reasonably interchangeable with other types of culvert.

(2) although acknowledging that the evidence showed Kaiser had the requisite specific intent to monopolize (Petition, p. A59), held there was insufficient evidence of the intent to eliminate Columbia as a competitor (Petition, p., A 53), totally inconsistent holdings.

(3) ignored the factual evidence presented at trial, which the Court of Appeals copiously noted in its opinion (by page and exhibit number) on such issues as:

(a) Kaiser's refusal to deal with Columbia

(b) Kaiser's plant relocation to punish Columbia for purchasing from Reynolds

(c) Kaiser's price squeeze on Columbia, supported by charts and the testimony of an economist (Prof. Oliver Williamson, to whose qualifications Kaiser stipulated).

(d) Kaiser's use of a vertically integrated, parent-subsidiary combination to eliminate independents

(e) restraint of trade by elimination of independents by the market power of a large dominant firm, enjoying over 80% of the product market, and over 75% of the raw material market.

Although KACC and KACSI have interspersed argument throughout their "Statement of the Case" Columbia will meet their legal points below.

ARGUMENT

I. BECAUSE THE COURT OF APPEALS BELOW HAS REMANDED THE CASE TO THE DISTRICT COURT, THE CASE IS NOT RIPE FOR REVIEW BY THIS COURT.

The Court of Appeals granted Columbia a new trial against KACC and KACSI. This Court will normally not grant certiorari to review a non-final judgment. In *Brotherhood of Locomotive Firemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, (1967), petitioners, who had obtained contempt orders from the District Court against union members and officials for violating a temporary restraining order forbidding a strike, sought certiorari to review adverse rulings made by the Court of Appeals on several legal issues. The Court of Appeals had remanded the case to the District Court on two factual issues in light of its ruling.

This Court denied certiorari holding.

> [b]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court. 389 U.S. at 328.

This Court, in *Brotherhood of Locomotive Firemen*, cited as authority *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, (1916), in which this Court had stated that:

> . . . except in extraordinary cases, the writ is not issued until final decree. [citations omitted] The decree that was sought to be reviewed by certiorari at complainant's instance was not a final one, a fact that of itself alone furnished sufficient ground for the denial of the application. *Id.* at 258.

In *Hamilton-Brown Shoe Co.*, complainants sought an injunction to restrain infringement of an alleged trademark for shoes and unfair competition in trade. The Circuit Court (predecessor of the District Court) dismissed the action. Upon appeal, the Circuit Court of Appeals found the words claimed as a trademark did not constitute a valid one as applied to shoes, but held

that complainants were entitled to be protected against unfair trade and directed the Circuit Court below to decree an injunction in accordance with the Court of Appeals' opinion. Complainant then petitioned the Supreme Court for a writ of certiorari to review the decision of the Court of Appeals, but certiorari was denied. 240 U.S. at 251.

This Court should deny the present petition for a writ of certiorari if only because the Court of Appeals below has remanded the case to the district court for a new trial. This case does not present a final judgment. Columbia will have additional witnesses at the second trial. Relevant facts which have taken place since the first trial will be placed in evidence. KACC and KACSI have never presented a defense. Trial on damages was bifurcated from liability, so that Columbia has not even presented its evidence on damages. Thus, the record is far from complete.

II. THIS CASE DOES NOT PRESENT ANY OF THE REASONS WHICH ARE STATED IN SUPREME COURT RULE 19 TO REVIEW A DECISION OF THE COURT OF APPEALS.

Supreme Court Rule 19(1) sets forth considerations governing the review of decisions on writ of certiorari. KACC and KACSI do not cite Rule 19 and fail to satisfy any of the requirements of Rule 19(1) (b);[3] which conditions the grant of certiorari to where a Court of Appeals:

(1) has rendered a decision in conflict with the decision of another court of appeals on the same matter; or

(2) has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or

(3) has decided an important question of federal law which has not been, but should be, settled by this Court; or

(4) has decided a federal question in a way in conflict with applicable decisions of this Court; or

[3] Since Rule 19(1)(a) provides considerations relating to the review of state court decisions, it is not pertinent to the petition presently before the Court.

this Court's power of supervision.

Before dealing separately with what KACC-KACSI assert is a conflict among the circuits on the question of the applicability of the Sherman Act to corporations and their wholly-owned subsidiaries under the so-called "Intra-Enterprise Conspiracy Theory", Columbia respectfully submits that the petition does *not* present any of the other reasons under Rule 19(1)(b).

Over and above the lack of specific support in Rule 19, there are several reasons by Certiorari should be denied:

(1) The directed verdict against Columbia was unfair, and Columbia is ready to proceed immediately, to remedy the wrongs of Kaiser. A comparison of the evidence as carefully reviewed by the Court of Appeals with the opinion of the district court shows that the district court ignored most of Columbia's evidence.

(2) Columbia represents it intends to call additional witnesses at the second trial. Also, Columbia intends to obviate certain of Kaiser's evidentiary objections, which were previously sustained. Thus, the record after the second trial will be different.

(3) This Court has on many occasions stated that antitrust laws are designed to aid competition. Columbia is now essentially out of business and there is little competition in the relevant market. After the Court of Appeals opinion, Columbia asked the district court to schedule a hearing for interim equitable relief, prior to the new trial, to enable Columbia to compete. Kaiser objected, that the District Court did not have jurisdiction while the present Petition was pending. We urge this Court to reject this petition promptly so that Columbia may proceed to its remedies in the district court.

(4) This case presents a very unique set of facts. A decision by this court would be of very limited precedential value. This case does not present any important antitrust issue which needs resolution by this Court.

III. THERE IS NO CONFLICT AMONG THE CIRCUITS ON THE SO-CALLED "INTRA-ENTERPRISE CONSPIRACY THEORY."

The main thrust of the KACC-KACSI Petition is an assertion that the decision of the Court of Appeals that KACC and KACSI acted jointly in violation of Section 1, is in conflict with prior decisions of this Court, and with decisions of other Circuits.

A. The Facts of This Case.

For this Court to consider that the propriety of the Court of Appeals ruling was in accord with established precedent, more details from the record need be stated concerning the KACC—KACSI relationship. Initially, although the Kaiser defendants now attempt to assert that KACC and KACSI are almost synonymous with each other, in Answers to Interrogatories, the separate functions of the two entities were explicitly set forth, see N.T. 2399-2402. KACC manufactured coil and sheet, but KACSI did not. KACSI manufactured culvert pipe, but KACC did not. The statement on page 17 of the Petition, "The incorporated division [KACSI] conducts no business except in connection with the sale of its parent's products" is absolutely incorrect and is a misrepresentation of the facts of record. KACSI, through its Highways Products Division did actually manufacture culvert pipe from the aluminum sheet and coil "transferred" to KACSI by KACC at a specific "transfer price."

A KACC official, C. E. Parker, produced under Rule of Civil Procedure 30(b)(6) (and therefore his testimony was binding on KACC under Rule 32) testified that KACSI received the aluminum coil and sheet at a "transfer" price which was *lower* than KACC's cost of manufacture. (See Exhibit P-823, N.T. 2448-9). These costs did not even include a charge for depreciation. N.T. 2433-4. If this had been included, the loss to KACC would have been greater. This situation existed during the years 1972, 1973 and 1974, the precise years when Kaiser's activities were causing the most adverse impact on

Columbia's operations. The Kaiser transfer price system had been purposely revised in 1970, to give fabricating operations, such as KACSI, the advantages of a lowered cost of material. N.T. 2430-2.

As the Court of Appeals recognized, the reduced cost of materials to KACSI gave it the opportunity to impose a squeeze on independent fabricators, but still make a profit for itself—because KACSI received the raw material needed to manufacture coil at a cost much lower than an independent fabricator could acquire the aluminum coil from Kaiser. The other coil producers, Reynolds and Alcoa, followed the Kaiser price for coil, as Kaiser was the recognized leader in this product. See Ex. P. 2012. It was obviously contrary to KACC's interests to sell (or "transfer") its coil at a loss, except for strategic reasons, and this fact warrants a finding that KACC and KACSI acted jointly in restraint of trade.

As Columbia's expert economist (Professor Oliver Williamson, Chairman of the Economics Department at the University of Pennsylvania and Professor of Economics, Law, and Public Policy at the Wharton and Law Schools of the University of Pennsylvania) testified, Kaiser was able to establish the squeeze on an independent fabricator such as Columbia precisely because it was vertically integrated. Kaiser used the different functions of KACC and KACSI to eliminate Columbia, whereas one of these entities alone could not have done so. It was the combination of the parent, KACC, which manufactured the coil, and KACSI, which manufactured the pipe, which resulted in Columbia's demise.

Kaiser makes the point that KACC and KACSI did not compete with each other. We submit that the record will support a finding that they did compete, although Columbia does not believe the law requires that actual competition between parent and subsidiary be shown before the parent-subsidiary conspriacy theory can be effective. KACC and KACSI each had their own prices for the exact same product, aluminum coil and sheet of the same alloy alclad H-3304 - H-34. See Exhibit P-188 (the KACC price list), and P-189, (the KACSI price list). These two price lists are effective for the same time period, and show these two companies offering the exact same product for sale at two different prices. This presents the possibility of competition. The KACSI list was a lower price, and was called by KACSI a "commodity price" which was used for KACSI's sales of coil and sheet to culvert fabricators. Although KACSI set the commodity price, KACC alone established the specification price. N.T. 2332. However, during the period that the squeeze was imposed on Columbia, KACSI did not sell coil from the commodity list, but used the higher KACC price list. N.T. 2327 - Exhibit P-956. Alcoa and Reynolds also jumped to the higher price after Kaiser did so. The evidence showed KACC wanted KACSI to cut down on sales to independent fabricators. Raising the price is one obvious way to do so.

It was the relationship between KACC's specification price list for coil and sheet, and KACSI's price list for finished pipe, which resulted in the squeeze on Columbia. Evidence was presented to show that this price structure was jointly agreed upon and designed to injure independent fabricators.

B. The Intra-Enterprise Theory in Prior Decisions of This Court

The Court has clearly held that common ownership will not insulate joint action by [illegible]ries within an integrated enterprise from the applica[illegible] Sherman Act. *U.S. v. Yellow Cab Co.*, 332 U.S. 218, 227 (1947); *Keifer Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968); *Timkin Roller Bearing Co. v. U.S.*, 341 U.S. 593, 598 (1951).

Defendants in the present case are distinct and separate corporate entities, and despite the fact that their claim that the Court of Appeals below "adopted a rigid, formalistic rule that the mere fact of incorporation" of a sales subsidiary "was a sufficient basis for capacity to conspire", (Kaiser's Petition for

Certiorari at 18), is contrary to the facts, this Court has made it abundantly clear that where companies

> have availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities.

Perma Life Mufflers, supra. at 141-42.

This Court has never held, as KACC-KACSI contend is implied by prior decisions, that commonly-owned corporations must be shown to be competing with one another in order for such firms to be liable for conspiracy with each other under the Sherman Act.

An excerpt from this Court's decision in *U.S. v. Citizens & Southern National Bank*, 422 U.S. 86 (1975), and set forth in Kaiser's petition at page 22, does not establish or even imply such a requirement. In fact, read properly in its full context, the Court's statement is that commonly-owned firms holding themselves out as distinct entities must compete with each other if they are to *avoid* liability under the Sherman Act for conspiracy.[4]

The concern of the Sherman Act is a combination that unreasonably restrains interstate commerce; or the coordinated effort to damage or destroy competition.

> The corporate interrelationships of the conspirators . . . are not determinative of the applicability of the Sherman Act. That statute is aimed at substance rather than form.

Yellow Cab, supra. at 227. Kaiser's contention that unless the distinct corporate entities hold themselves out as competitors and are shown to be competing, no conspiracy can be found under the Sherman Act is untenable and, at best, places form over substance.

[4] "The central message of the Sherman Act is that a business entity *must* find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors. This Court has held that even commonly owned firms *must* compete against each other, if they hold themselves out as distinct entities." *U.S. v. Citizens & Southern National Bank, Supra.* at 116 (emphasis added).

It is the nature of vertical integration that firms in an enterprise so arranged perform different functions in the manufacture and marketing of a product. Usually, a vertically integrated enterprise is comprised of firms which do *not* compete with one another.

By Kaiser's logic, any joint action to restrain trade between or among subsidiaries in a vertically integrated enterprise would be exempt from the coverage of the Sherman Act. We submit that this Court would never endorse such a proposition, because it is totally inconsistent with years of established precedent. This would also be poor antitrust policy, because of the tremendous growth of vertical integration and the great market power already held by vertically integrated firms in the United States. The rule proposed by KACC and KACSI would be a death knell to independents.[5] If such a radical change is to be made in the application of the antitrust laws to the structure of United States industry, it should be done by Congress.

Kaiser's position is absolutely contrary to the approach taken by the Court for many years, as is obvious from its decisions in *Perma Life Mufflers, supra,* and *Yellow Cab, Supra.*

In *Perma Life Mufflers,* defendant Midas was a wholly-owned marketing subsidiary of the parent manufacturer, defendant International Parts. Those defendants were distinct corporate entities, not in competition with each other, but part of a vertically integrated enterprise. The Court held that the defendant firms were not saved from liability under the Sherman Act for conspiracy to restrain trade by their common ownership nor by their having comprised a vertically integrated enterprise.

In *Yellow Cab,* the Court found a violation of Section 1 of the Sherman Act where defendants in the conspiracy included a parent taxi cab manufacturer and several subsidiaries, one a sales subsidiary and the other holding licenses and operating cabs in Chicago. There was no competition between the parent and either the sales subsidiary or the other subsidiaries.

[5] This Court has long interpreted the Sherman Act as guarding against a concentration of economic power in the hands of a few, *U.S. v. Von's Grocery Co.*, 384 U.S. 270, 275 (1966).

The conspiracies found in *Perma Life Mufflers*, and *Yellow Cab*, were successful in their unreasonable restraint of commerce precisely because of the vertical interaction of the defendant firms.

In fact, the essence of the price squeeze that has been perpetrated by defendants KACC and KACSI against Columbia is the strategic exploitation of the advantages of vertical integration of the Kaiser business enterprise. Circuit Judge Adams recognized this factor when stating:

> Some of the efforts which allegedly engineered Columbia's elimination were concededly undertaken by KACSI alone. However, the jury could have found that the *combined efforts of KACC and KACSI were utilized* (1) to impose the price squeeze and (2) to open the New Castle plant. Defendants' Petition for Certiorari, Appendix D, at A31 (emphasis added).

Petitioners' assertion that *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) requires, or even implies a requirement, that, to be conspirators under the antitrust laws, corporations within a vertically integrated enterprise must hold themselves out as competitors or be in competition is unfounded. The Court in *Kiefer-Stewart* specifically rejected any contention of immunity from the antitrust laws because corporations charged with conspiracy were "mere instrumentaties of a single manufacturing-merchandizing unit."

> . . . . This suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E.G. *United States v. Yellow Cab Co.*, 332 U.S. 218. The rule is especially applicable where, as here, respondents hold themselves out as competitors.

340 U.S. at 215.

The *Kiefer-Stewart* Court neither held nor implied any requirement of competition between corporations charged with conspiracy in violation of the Sherman Act. The Court clearly affirmed its prior decisions which dismissed such a contention

and went on to state that the rule of these decisions is "especially applicable" but *not* only applicable where the conspirators hold themselves out as competitors.

Syracuse Broadcasting Corporation v. Newhouse, 319 F. 2d 683 (1963), is cited generally by Kaiser as having interpreted decisions of the Court to require evidence that the parent and wholly-owned subsidiary compete with each other or hold themselves out to the public as distinct entities. A Syracuse radio station brought an action against a corporation and its wholly-owned subsidiary radio stations and newspaper under the Sherman and Clayton Acts charging that they conspired in restraint of trade by, among other actions, giving discriminatory advertising advantages to defendant radio stations and refusing to publish items favorable to plaintiff in defendant newspapers.

The court stated,

> the primary vice in these arrangements . . . lies not in the granting of free advertising, but in the common control of the corporations involved. The combination of resources available to defendants naturally make it more difficult for a competitor having more limited resources.

Id. at 687 (emphasis added).

This Court has never even intimated, and certainly never held, that such anti-competitive combinations are immune from the scope of the Sherman Act. The Court of Appeals' decision on the unique facts of this case, is not in conflict with prior decisions of the Court.

C. There is No Conflict Among the Circuit Courts Concerning the "Intra Enterprise Company Rule."

Nor can it be said that there is a conflict among the circuits regarding a finding of intra-enterprise conspiracy. Kaiser contends that the Second, Fourth and Ninth Circuits have interpreted *Kiefer-Stewart* and other Supreme Court decisions as requiring evidence that a parent and its wholly owned subsidiary compete with each other or hold themselves out to the public as district entities while the Third, Seventh and Eighth Circuits

give practical controlling significance to the fact of formal corporate distinctness. A brief survey of the cases cited by Kaiser indicates that the alleged "conflict" does not exist.

Petitioners cite several cases as requiring evidence of competition between parent and subsidiary. In *Syracuse Broadcasting Corporation v. Newhouse*, 319 F.2d 683 (1963), the Second Circuit cited *Yellow Cab, supra., Kiefer-Stewart, supra.* and *Timken Roller Bearing Co. v. United States*, 341 U.S. 593, 71 S.Ct. 971 (1951) stating:

> of considerable importance here is the fact that the newspapers and radio stations were jointly owned. There is no doubt that the fact of common ownership will not prevent the finding of a conspiracy, the Supreme Court having rejected the argument that there cannot be a conspiracy among affiliated enterprises.

319 F.2d at 687.

The Court in *Syracuse Broadcasting* considered the free advertising arrangement between the commonly-owned newspaper and radio stations of the alleged conspiracy as "merely affecting a redistribution of corporate profits." *Id.* at 687.

But, contrary to Kaiser's implications, the Second Circuit did not hold that the plaintiff was required to establish that a state of competition existed between the conspirators. In fact, the Court stated that common ownership was the "primary vice" in the free advertising arrangement.[6]

In *REA Express, Inc. v. Alabama Great Southern Railroad Company*, 427 F.Supp. 1157 (S.D.N.Y. 1976), *aff'd* 550 F.2d 1342 (2d Cir. 1976), the agreement alleged as the basis of a Sherman Act conspiracy "was between the railroads and their wholly-owned subsidiary; the interests of no other persons were affected." 427 F.Supp. at 1166. Judge Friendly stated that the proposition

> "that agreements between parents and subsidiaries affecting only their internal relationships violate the Sherman Act—has been repudiated by several commentators, including Justice Department officials charged with enforcing the antitrust laws.

427 F.Supp. at 1166.

This is by no means an expression that, as Kaiser asserts, the "intra-enterprise conspiracy doctrine has been repudiated by several commentators . . ." (Petition, at p. 26, 27). In fact, the action in *REA Express* was brought by REA against its owners and other holders of notes issued by REA, and not by third party claiming injury as a result of a conspiracy. Thus *REA* is inapposite to the present case, where the interests of an outsider (Columbia), were injured by the combined efforts of KACSI and KACC.[7]

Citing only *Ark Dental Supply Co. v. Cavitron Corp.*, 461 F.2d. 1093 (3d Cir. 1972) as inconsistent with other decisions of the Third Circuit, Kaiser's assertion that "the law within some of the circuits is somewhat confused" is a misleading overstatement. The Court in *Ark Dental Supply* held that defendant's decision to sell only to dealers of a division of the parent corporation was a legitimate business decision and not a Sherman Act violation.

Any uncertainty as to the Third Circuit's position on the intra-enterprise conspiracy issue was laid to rest in *Cromar v. Nuclear Materials & Equipment Corp.*, 543 F.2d. 501, 512 (1976) ("we do not consider the absence of the appearance of

[6] The discussion of *Kiefer-Stewart* in *Beckman v. Walter Kidde & Company*, 316 F. Supp. 1321 (E.D.N.Y. 1970) *aff'd* 451 F.2d 593 (2nd Cir. 1971) *cert. denied*, 408 U.S. 922 (1972), is merely dictum in that the district court found that plaintiff's allegations were insufficient, failing to indicate the nature of the conspiracy charged. The Second Circuit, which, affirmed only this narrow holding and did *not* address the question of intra-enterprise conspiracy at all can not be said to have taken an approach regarding that issue which is inconsistent with that taken by the Third Circuit.

[7] In *Call Carl, Inc. v. B P Oil Corp.*, 403 F. Supp. 568 (D.Md. 1975), *aff'd*, 554 F 2.d 623 (4th Cir. 1977) *cert. denied*, 46 USLW 3293, the district court held that "the plaintiffs failed to prove that a conspiracy existed, either horizontally or vertically." 403 F. Supp. at 572. While the lower court did address the intra-enterprise conspiracy issue in dictum, the Court of Appeals affirmed the directed verdict on the Sherman Act allegation but stated that they had no occasion to review the district court's analysis of the intra-enterprise conspiracy theory. 554 F. 2d at 628 n. 4.

competition between the defendants a bar to Section 1 liability.") which principle was restated in Judge Adams' opinion below in this case.

IV. THE "PRICE SQUEEZE" ASPECT OF THIS CASE DOES NOT WARRANT CERTIORARI.

In the lower court, Kaiser asserted that a price squeeze was not recognized as good legal theory.[8] However, the briefs below show that Kaiser's law firm is asserting this specific theory as counsel for a plaintiff in another antitrust case. Now, Kaiser retreats and only asserts Columbia did not meet the requirements for a price squeeze as stated by Judge Learned Hand in *U.S. v. Aluminum Company of America*, 148 F.2d 416 (2d Cir., 1945)

Initially, it must be emphasized that the Court of Appeals holding does not stand or fall on the applicability of "price squeeze" theory. If only for this reason, there is no need to examine the price squeeze in this case. The Court of Appeals relied on ample other evidence in the record to support its decision, that the directed verdict against Columbia was improper.

The assertion at page 30 of the Petition that the price squeeze is improperly applied to this case is without any merit. The fact that Kaiser itself did not sell aluminum sheet or coil to Columbia after 1970 is irrelevant. The record was uncontradicted that there were only two other suppliers of aluminum coil of the alloy necessary for culvert, Reynolds and Alcoa. Columbia's evidence showed that their pricing practices strictly followed Kaiser. Kaiser's documents reflect Kaiser's knowledge of this fact. In fact, the evidence showed that at one point Alcoa invoiced Columbia at the Kaiser published price, even though the Alcoa published price was different. The fact that Kaiser asserts that it did not sell coil in the Mid-Atlantic area, aside from being a matter of defense, is also irrelevant because all these suppliers used a nationwide delivered price list.[9] Reynolds and Alcoa did sell, and the price was the same, regardless of who sold the coil, or where the purchaser was located.

Whether the price at which Kaiser sold coil was higher than a "fair price" is not an absolute requirement under Judge Hand's opinion. But even so, the fact that Kaiser published a lower "commodity price" could indicate to the jury that the specification price (its existence and use actually caused the squeeze) was higher than a fair price, at least applied to an independent fabricator, given Kaiser's transfer pricing strategy described above, which "transferred" the coil from KACC to KACSI at a much lower price than an independent had to pay.

The Kaiser price squeeze was also testified to at trial by W. J. Arvay, another 100% aluminum fabricator in South Carolina.

Although Kaiser asserts that there is no evidence showing that Kaiser had a monopoly position in the sale of aluminum coil and sheet, Exhibits P-839-842 (page entitled "Market Share") show that KACC coil and sheet shipments were 78.6% in 1972, 72% in 1973, and 77% in 1974, of all producers in the United States. We submit that these percentages clearly raise a jury issue on KACC's monopoly share. Kaiser asserts that this evidence was not precise for the geographical market, but as Professor Williamson stated, since Kaiser published a nationwide delivered price for aluminum coil, its market power nationally would have been effective in the precise geographical area.

[8] A price squeeze takes place when a vertically integrated manufacturer dominant in the product sells raw material to independent fabricators, and the fabricated product to end users, at prices so close to one another that there is no margin for the independent to incur the cost of fabrication and a reasonable return on investment. For other discussions of economic power and a squeeze, see *U.S. v. New York Great Atlantic & Pacific Tea Co.*, 173 F. 2d 79, 88 (7th Cir., 1949), and Congressional hearings, House Subcommittee No. 4, Select Committee on Small Business, *Impact upon Small Business of Dual Distribution and Related Vertical Integration*, November 1963, pp. 1763-68, (a manufacturer of aluminum culverts testified to a price squeeze); pp. 1769-81, (a manufacturer of aluminum wire testified to a price squeeze); House Subcommittee No. 3, Select Committee on Small Business, *Small Business in the Aluminum Industry*, May 1960, pp. 83-93, (a manufacturer of aluminum siding testified to a price squeeze).

[9] For a discussion of how nationwide delivered price lists in aluminum impede competition, see Council on Wage and Price Stability, *Aluminum Prices, 1974-75* (Staff Report), Sept. 1976, pp. 147, 220-225.

V. THE RELEVANT PRODUCT MARKET ISSUE IN THIS CASE IS FOR THE JURY TO DECIDE.

Kaiser consistently only refers to the portions of the record that favor their definition of the market, i.e., steel and aluminum culvert are interchangeable. Kaiser refuses to even cite or acknowledge the rule applied in *U.S. v. Aluminum Company of America*, 377 U.S. 271 (1964) that it is the perception of buyers, not sellers, that is relevant. Columbia's expert engineer testified in great detail why aluminum was a specialty product and was not interchangeable. The evidence showed that although there was some competition by sellers to get specifications, once an engineer had decided which product was better, he would specify only one type of culvert and alternate specifications were "rare". The evidence also showed that while aluminum was not allowed on major state or federally funded highways, it did have a specialty use in local roads in South Jersey because of its superior performance in a salt water environment. A review of the lower court's opinion shows that it is in accord with, and relies on, prior decisions of this Court. Kaiser shows no conflict with other Circuit courts.

CONCLUSIONS

For these reasons, Columbia requests the Court to deny the Petition for Writ of Certiorari.

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